A

WTK HOLDINGS BHD

v.

YAYASAN ISLAM NEGERI KEDAH

B

HIGH COURT MALAYA, ALOR SETAR
SOFIAN ABD RAZAK J
[CIVIL APPEAL NO: 22-226-2007]
1 JULY 2009

C ***CIVIL PROCEDURE:*** *Summary judgment - Whether triable issues raised - Whether fit and proper case for summary judgment - Rules of the High Court 1980, O. 14*

CIVIL PROCEDURE: *Striking out - Whether plain and obvious case*
D *for striking out - Rules of the High Court 1980, O. 18 r. 19*

The plaintiff sued the defendant to recover an advance payment made pursuant to a logging concession JVA that failed to materialize. The plaintiff applied for summary judgment (encl. 6) whereas the defendant applied to set aside and strike out the
E plaintiff's writ and statement of claim under RHC O. 18 r. 19(1)(a), (b) and (d) (encl. 8).

Held (dismissing both applications (encls. 6 and 8)):

F **(1)** After perusing the affidavits filed by both parties, the High Court was of the view that there were triable issues raised which ought to be tried by calling witnesses. There were also matters relating to the proper interpretation of the JVA and the Supplemental Agreement which could only be properly
G addressed at the trial. The defendant had succeeded in raising triable issues and the defendant should be granted unconditional leave to defend the plaintiff's claim. Therefore, the plaintiff's application ought to be dismissed with costs in the cause. *Bank Negara Malaysia v. Mohd Ismail & Ors* (SC) (foll); *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd*
H (SC) (foll); *Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong* (refd). (paras 41 & 42)

(2) Under O. 18 r. 19(1)(a), (b), and (d) of the RHC 1980, the court may at any stage of the proceedings order to be struck
I out any writ and statement of claim in the action on the ground that: (i) it discloses no reasonable cause of action or defence as the case may be; (ii) it is scandalous, frivolous or

vexatious; or (iii) it is otherwise an abuse of the process of the court. In determining whether the statement of claim discloses a reasonable cause of action, the state of affairs to which the court must have regard is the state prevailing at the date the action is filed – as determined by the pleadings itself. No affidavit evidence is admissible. *Gasing Heights Sdn Bhd v. Aloyah bt Abd Rahman & Ors*; (foll); *S Manickam & Ors v. Ismail Mohamed & Ors* (refd); *Zakaria Mohamed Esa v. Dato Abdul Aziz b Ahmad & Ors* (refd). (paras 46 & 47)

(3) The word 'scandalous' means 'wholly unnecessary and irrelevant' and not merely unpleasant allegations. The words 'frivolous or vexatious' on the other hand, mean 'obviously unsustainable'. A pleading is embarrassing where it is not clear what is being pleaded. The High Court has an inherent jurisdiction to prevent the institution of civil proceedings which are likely to constitute an abuse of the process of the court. *Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong @ Teh Hong Jet* (refd); *Boey Oi Teng t/a Indah Reka Construction & Trading v. Trans Resources Corporation Sdn Bhd* (refd); *Ebert v. Venvil And Another, Ebert v. Birch And Another* (refd). (paras 48, 49, 50, 51, 52 & 53)

(4) The instant case was not a plain and obvious case for striking out. The summary procedure should only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable.' The court is not obliged to go on a minute examination of the documents and facts of the case. So long as the pleading discloses some cause of action or has raised some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for it to be struck out. In the instant case, the court had granted the defendant unconditional leave to defend in the plaintiff's application for summary judgment. Thus to allow the defendant's application to strike out the claim would be inconsistent with the decision made in respect of the plaintiff's application that there were triable issues raised by the defendant. *Bandar Builder Sdn Bhd v. United Malayan Banking Corp. Bhd* (foll). (paras 54, 55 & 56)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(foll)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC

Boey Oi Teng v. Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 HC ***(refd)***

Ebert v. Venvil And Another, Ebert v. Birch And Another [1999] 3 WLR 670

Ford v. Beech [1848] 11 QB 852 ***(refd)***

Gabriel Peter & Partners v. Wee Chang Jin [1998] 1 SLR 374 ***(refd)***

Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC ***(foll)***

Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong [1984] 1 LNS 45 HC

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

S Manickam & Ors v. Ismail Mohamed & Ors [1996] 1 LNS 117 HC ***(refd)***

Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong & Teh Hong Jet [2006] 7 CLJ 541 HC ***(refd)***

Zakaria Mohamed Esa v. Dato Abdul Aziz Ahmad & Ors [1984] 1 LNS 92 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 18, 40

Rules of the High Court 1980, O. 6, O. 14, O. 18 r. 19(a), (b), (d)

For the plaintiff - Duratul Ain; M/s Lee Hishammuddin Allen & Gledhill

For the defendant - Dato' Shamsul Bahrain; M/s Dasuki & Co

Reported by Andrew Christopher Simon

JUDGMENT

Sofian Abd Razak J:

[1] Enclosure 6 is the plaintiff's application by way of summons-in-chambers dated 5 November 2007 for summary judgment against the defendant for the sum of RM5 million with interest and costs pursuant to O. 14 of the Rules of the High Court 1980

(hereinafter called the 'RHC 1980'). The said application is supported by an affidavit-in-support (encl. 7) affirmed on 25 October 2007 (hereinafter called the 'affidavit-in-support'). The defendant through its General Manager had filed an affidavit-in-reply to encl. 7 (hereinafter called the 'affidavit-in-reply).

[2] The plaintiff's solicitors then proceeded to file a notice to attend case management fixed for hearing on 26 April 2009. Prior to the filing of the application for case management, the defendant had filed an application by way of summons-in-chambers dated 6 December 2007 (encl. 8) praying for an order that the plaintiff's writ and statement of claim be set aside and struck-out respectively pursuant to O. 18 r. 19(1)(a), (b) and (d) of the RHC 1980. Enclosure 8 is supported by an affidavit-of-support dated 29 November 2007 (encl. 9).

[3] The defendant had also filed an affidavit-in-reply to the plaintiff's application for summary judgment dated 29 November 2007 (encl. 10). The plaintiff had filed an affidavit-in-reply to both the defendant's affidavits in encls. 6 and 8 respectively (encl. 12).

[4] The defendant then had filed an affidavit-in-reply in respect to plaintiff's affidavit in encl. 12 (encl. 13).

[5] The court then informed the parties that the court will hear both encls. 6 and 8 together and directed that written submissions together with the bundles of authority be filed. On 11 February 2009, the court after perusing both the encls. 6 and 8 respectively and after reading the respectively written submissions, dismissed both encls. 6 and 8 with costs in the cause. The plaintiff and the defendant who were dissatisfied with the said decisions have since filed an appeal.

Background Case According To Plaintiff

[6] By a joint venture agreement dated 26 March 2002 (hereinafter called 'the JVA') and a Supplemental Agreement to the JVA dated 9 April 2002 (hereinafter called 'the SA'), the plaintiff and the defendant agreed to collaborate to develop and secure a logging concession. Pursuant to clause 2.1 of the SA, the plaintiff paid the sum of RM5 million to the defendant as advance payment for royalty, premium and less (advance payment) for the logging licence of the logging concession (Logging Licence) clause 2.1 of the SA is reproduced herein in *verbatim*.

A 2.1 Upon execution of this Agreement, WTK shall pay to YINK for the benefit of the State Authority of the said sum as an advance payment for royalty, premium or cess payable to the State Authority under the Licence.

B **[7]** The defendant, pursuant to clause 2.5 of the SA agreed to refund to the plaintiff, within three (3) months of the notice of demand by the plaintiff, the advance payment in the event, amongst others, the Logging Licence was not issued. Clause 2.5 of the SA herein is reproduced in *verbatim*.

C 2.5. If for any reason whatsoever the relevant authorities shall not be satisfied with the EIA Report as the Licence shall not be issued to the JV Company or if issued shall be upon terms and conditions not satisfactory to WTK and/or YINK, then YINK shall refund the said sum free of interest to WTK within three (3) months from written demand by WTK.

D **[8]** The Logging Licence was not issued. The plaintiff by a letter dated 12 July 2005 demanded that the defendant refund the advance payment. However, the defendant did not refund the advance payment within three (3) months or at all. The plaintiff E through its solicitor's letters dated 12 March 2007 and 26 June 2007 made further demands to the defendant for the refund of the advance payment. To date, the defendant has refused, failed and neglected to refund the advance payment to the plaintiff.

F **Background Of The Case By The Defendant**

[9] At all material times, WTK Holdings Berhad ("WTK") the plaintiff held themselves out as having the expertise in timber harvesting by using helicopter aircraft ("heli-harvesting") with wide G experience in Borneo and elsewhere and in furtherance of the representation thereof, the plaintiff by letter dated 5 December 2001 submitted to the Kedah State Government ("the State Government") as a proposed timber harvesting method of harvest merchantable timber logs from the catchment areas of the Muda H Dam, Pedu Dam and Ahning Dam ("the project") which collectively comprised a total area of approximately 303,312 acres ("the Concession Area").

[10] On the aforesaid representation, the State Government accepted the proposal and agreed to enter into direct negotiations I with the plaintiff to develop and secure the project and upon conclusion of the said negotiations a joint-venture agreement be

entered between the parties on terms and conditions they mutually agreed upon and in line with the said Enactment the State Government would assign the defendant to step into their shoes and to participate with the plaintiff to implement and undertake the project in collaborating in an incorporated joint venture vehicle ("JV company").

[11] By an agreement in writing contained in and evidenced by a Joint Venture Agreement dated 26 March 2002 made between and signed on behalf of the plaintiff and the defendant ("the agreement") the plaintiff and the defendant agreed to fully co-operate exclusively with each other during the subsistence of the agreement to ensure the complete success of the joint venture and the JV Company shall be the exclusive vehicle for the parties in implementing and carrying out the project.

[12] After the execution of the joint-venture agreement, the plaintiff continued to negotiate with the State Government of the day to the exclusion of the defendant on the implementations of its terms and conditions and in the result for reasons best known to the plaintiff it was decided to delete art. 5 in its entirety.

[13] There came a time when both the plaintiff and the State Government decided to dwell upon the said sum again with some modifications in its provisions to facilitate its disbursements and utilizations. Under the deleted art. 5:

i) the sum of RM5 million was to be deposited with the bank into a joint account in the name of the JV Company and to be operated jointly by the parties;

ii) the said sum should be released explicitly to the State Authority to all appearances "as an advance payment under the Licence."

iii) The said sum if released to the state authority should be deemed a loan by WTK to the joint company.

[14] The said terms were found to be to the detriment of the plaintiff as the method provided therein was unacceptable and inappropriate as it involved the plaintiff directly as a co-accountee. And a new method was devised whereby only the defendant was involved and the plaintiff appeared to be detached from the release of the funds.

[15] New terms were formulated by the plaintiff as a mask to detach themselves from becoming a party to the subsequent disbursements to the State Government and they were to be incorporated into a fresh agreement and under this new provision the said sum did not pass through the joint-account or any account for that matter. It was a ploy and a scheme also for its recovery. It was a win-win situation.

[16] The SA dated 9 April 2002 between the plaintiff and defendant was to supplement the JVA.

[17] Thus, by the supplemental agreement just agreed upon between the plaintiff and the State Government:

i) No joint account between WTK and YINK was to be opened for that purpose; and

ii) The said sum was not to be deposited into the joint-account and/or operated jointly between WTK and YINK;

iii) Instead, the said sum was to be paid to and for the enjoyment of the State Authority through YINK as a conduit and agent between WTK and the State Authority;

iv) It was agreed and understood that YINK was duly authorized by the State Authority to receive the said sum as an agent for transmission to the State Authority;

v) The said sum was to be released to the State Authority not against the issue of licence and free from condition precedent but merely for the benefit of the State Authority.

[18] It was upon those terms and conditions that the State Authority began to submit invoices for payments to various suppliers with full knowledge and consent of the plaintiff. The plaintiff are estopped *in pais* from denying that the said sum was for the benefit and enjoyment of the State Authority.

[19] The provision in clause 2.1 of the Supplemental Agreement is divisible into two parts ie, (1) for the benefit of the State Authority; and 2) an advance for royalty, premium or cess payable to the State Authority under the licence.

i) the second part is an adjunct to the first;

ii) the two parts are contradictory in terms and are, therefore, exclusive according to the surrounding matter;

[20] Where there is an expression mentioned in the instrument of a certain thing, this will exclude any other thing of a similar nature: *expression unius ese exclusion alterius.*

> An agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.

[21] Per Parke B in *Ford v. Beech* [1848] 11 QB 852 at p. 866.

[22] Upon execution of the Supplemental Agreement, the defendant in respect of the said sum being an agent of both the State Authority and the plaintiff, paid various sums on diverse dates at the instant of and to the State Authority.

[23] Those payments were made by the defendant for the benefit of the State Authority pursuant to an understanding between the plaintiff and the State Government as expressed in article 2 of the Supplemental Agreement.

Plaintiff's Failure To Perform Part Of The Bargain

[24] The plaintiff in breach of their covenant failed, refused or neglected to notify the defendant of the name of the JV Company much less to form and incorporate the JV Company. For reasons of this fundamental breach, the joint-venture company failed to materialize.

[25] It was a condition precedent of the joint venture agreement that the plaintiff within one week should notify the defendant of the name of the JV Company.

[26] It was a material term of the joint-venture agreement that the plaintiff should within four weeks of its execution, submit a report containing an assessment of the impact the project would have or was likely to have on the environment by way of Environmental Impact Assessment ("EIA") report to the Department of Environment ("DOE") in the name of the JV Company.

[27] Since there was no JV Company formed under the joint-venture agreement and naturally there was no properly constituted EIA Report submitted in the name and on behalf of the JV Company to the DOE for their consideration and lastly there was no application for the licence submitted by the JV Company, the project never took off.

[28] In the circumstances, the defendant was entitled to put an end to the contract under s. 40 of the Contracts Act 1950 which provides that when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Plaintiff's Submission On O. 14 And On O. 18 r. 19 RHC 1980

[29] The learned counsel for the plaintiff submitted that its application in encl. 6 is proper and in accordance to O. 14 RHC 1980 and the burden is on the defendant to satisfy the Honourable Court as to why summary judgment should not be entered against it. Reference was made to the case of *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283.

[30] As to the issue of whether the Advance Payment of RM5 million was payable by the defendant or the Kedah State Government to the plaintiff, learned counsel for the plaintiff submitted that the contemporaneous letter by the defendant dated 15 April 2007 in reply to the plaintiff's solicitor's letter of demand dated 12 March 2007 shows that the defendant is indeed responsible for refunding the RM5 million to the plaintiff. It was not the responsibility of the Kedah State Government to do so. The undisputed fact of this case was that the logging license was never issued and clause 2.5 of the SA clearly spelt out *inter alia* that 'or the licence shall not be issued to the JV company ... then YINK shall refund the said sum free of interest to WTK within three (3) months from written demand by WTK.'

[31] The learned counsel for the plaintiff further submitted that clause 2.1 of the SA said that the advance payment of RM5 million was for the benefit of the State Authority as advance payment for royalty, premium or less payable to the Kedah State Government under the licence. The defendant represented and warranted that

it was duly authorized by the Kedah State Government to receive the advance payment of RM5 million and gave good receipt for it. The terms of JVA and SA are clear and well documented, if the logging licence was not granted, the defendant was required to refund the advance payment to the plaintiff within three months from when it receives a demand from the plaintiff to do so. No other evidence may be adduced to be read into the JVA and SA.

On Whether The Advance Payment Was Paid As Gratification Is Immoral And Against Public Policy

[32] The learned counsel for the plaintiff submitted that the advance payment was agreed upon by the plaintiff and defendant in the JVA and SA. Parties are bound by the terms of the JVA and SA. The defendant having received the advance payment without any objections, now complaints some five years later, that the advance payment is immoral and against public policy. The defendant by its conduct is estopped from raising this line of argument.

On Whether There Was A Misrepresentation By The Plaintiff In The JVA And The SA

[33] The learned counsel for the plaintiff submitted that there was no misrepresentation by the plaintiff in that plaintiff has the expertise in timber activities including timber harvesting by Heli-Harvesting by using a helicopter.

[34] The defendant has not shown any evidence that the plaintiff is not an expert in Heli-Harvesting/Heli-Logging.

[35] In conclusion, the learned counsel for the plaintiff submitted that in the light of the defendant's admission which is a contemporaneous document, it is clear that there are no issues to be tried and prays for encl. 6 to be allowed with costs and that encl. 8 be dismissed with costs as it is not a plain and obvious case for the court to exercise its powers to summarily strike out the plaintiff's claim.

The Defendant's Submission On O. 14 And O. 18 r. 19 RHC 1980

[36] The learned counsel for the defendant alleges that the writ issued by the plaintiff does not comply with O. 6 RHC 1980. It is irregular as it does not conform to Form 2 of the RHC 1980. The defendant further alleges that the plaintiff's claim is defective

as the terms of the JVA and the SA are not in it. There is non-disclosure or suppression of material facts by the plaintiff. The statement of claim must be complete and good in itself, any defect or omission cannot be corrected or supplemented by the plaintiff's affidavit.

[37] The learned counsel for the defendant had also raised the issue of whether the advance payment of RM5 million was payable by the defendant or the Kedah State Government to the plaintiff? The learned counsel for the defendant avers that the true purpose for which the money was paid, namely for the benefit of the State Authority was concealed and suppressed. In clause 2.1 of the SA, it stipulates that the purpose for which the said sum (advance payment) was to be paid to the defendant for the benefit of the State Authority, as advance payment for royalty, premium or less payable to the Kedah State Government under the licence.

[38] The learned counsel for the defendant contends that the advance payment made by the plaintiff is immoral and against public policy.

[39] The learned counsel for the defendant further submitted that the plaintiff had misrepresented that it has the expertise in the timber activities including the timber harvesting by using a helicopter aircraft. The defendant took issue with the picture of a helicopter depicted in the trade publications as being American instead of Malaysian. The helicopter was registered with the Federal Aviation Authority (FAA) of the United States of America and carried a call-sign N159AC. The helicopter was not registered with the Malaysia Department of Civil Aviation (DVA) and therefore, cannot operate within the air space of Malaysia. Only aircraft which registered with the DCA are allowed to operate commercially within Malaysian airspace. The learned counsel for the defendant referred to s. 18 of the Contracts Act which provides that a misrepresentation includes the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.

[40] In conclusion, the learned counsel for the defendant submits that there are triable issues to be tried and prays that the plaintiff's application for summary judgment under O. 14 in encl. 6 be dismissed with costs in any event and the defendant's application to strike out the plaintiff's claim under O. 18 r. 19(1) in encl. 8 be allowed with costs in any event.

Finding Of The Court

[41] The law on O. 14 application for summary judgment.

The basic principle applicable is that as stated by Mohamed Azmi SCJ in the *locus classicus* case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 when delivering the majority judgment of the Supreme Court, and I find it necessary to quote from his judgment *in extenso*:

> In our views, basic to the application of all those legal propositions is the requirement under O. 14 for the court to be satisfied on the affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavit, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* had this to say at p 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts to evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
>
> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with the undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issue of fact or law, the court must go one step further and

A determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

B There is no dearth of authorities as to the principles of summary judgment on O. 14 of the RHC, but for the moment suffices if I also refer to an earlier case of *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 where Hashim Yeop A Sani SCJ (as he then was) had occasion to express as follows at p 183:

C

> What is involved in the present appeal is the other principle considered in *European Asian* by Goff LJ (as he then was) that is, what happens when a legal issue is raised by the defence in an O. 14 application. In this regard several principles are involved. First, the court hearing an O. 14 application should work within the framework of O. 14 and not embark on an exercise under O. 33 r. 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact of law or partly of fact or partly of law before trial of the cause or matter. Order 33 r. 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference of any facts or where the facts are clear and undisputed the court should exercise its duty under O. 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

D

E

F

At p 184, it was further held:

> The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

G

H

I

The defendants should be allowed to defend where the court is satisfied from the issue raised and whether in the circumstances of the case there ought to be a trial. It is not enough for the defendant to merely deny the amount owed but the defendant must plead any salient and relevant facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds. See the case of *Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong* [1984] 1 LNS 45.

[42] In the instant case, the court has had opportunity of perusing the voluminous affidavits filed by both the plaintiff and the defendant where serious allegations were raised by the defendant and counter explanation by the plaintiff. These go to show that there are triable issues raised which should be tried by calling witnesses. There are matters which relate to the proper interpretation of the JVA and SA which could properly be addressed at the trial. The court is of the view that the defendant has succeeded in raising triable issues and the defendant should be granted an unconditional leave to defend the plaintiff's claim. Therefore, the plaintiff's application in encl. 6 is hereby dismissed with costs in the cause.

[43] The court will discuss briefly the principles relating to striking out.

[44] In order for the defendant to succeed for an order under O. 18 r. 19(1) of the RHC, he must satisfy the court that the plaintiff's claim is plainly and obviously hopeless and scandalous, frivolous or vexatious where the defences are unarguable.

[45] The Federal Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293:

> The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under Order 18 r. 19 of the Rules of the High Court 1980; the summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable.'

Order 18 r. 19(1)(a), (b) And (d)

[46] Under O. 18 r. 19(1)(a), (b), and (d) of the RHC, the court may at any stage of the proceeding order to be struck out any writ and statement of claim in the action on the ground that (a)

it discloses no reasonable cause of action or defence as the case may be; (b) it is scandalous, frivolous or vexatious; or (d) it is otherwise an abuse of the process of the court.

[47] In *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695 Mahadev Shanker J stated that the court in determining whether the statement of claim discloses a reasonable cause of action, the state of affairs to which the court must have regard is that which prevailed at the date the action is filed which has to be determined by the pleading itself. No affidavit evidence is admissible (see *S Manickam & Ors v. Ismail b Mohamed & Ors* [1996] 1 LNS 117, *Zakaria Mohamed Esa v. Dato Abdul Aziz Ahmad & Ors* [1984] 1 LNS 92 HC).

[48] From the plethora of authorities pertaining to the question of what amounts to 'scandalous,' it is taken to mean 'wholly unnecessary and irrelevant' and not merely unpleasant allegations. The cases which discussed the meaning of 'scandalous' are *Technointan Holding Sdn Bhd v. Tetuan Tan Kim Siong & Teh Hong Jet* [2006] 7 CLJ 541 and *Boey Oi Teng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405.

[49] The words 'frivolous or vexatious' on the other hand, mean 'obviously unsustainable' (see *Technointan Holding Sdn Bhd v. Tetuan Tan Kim & Teh Hong Jet (supra))*.

[50] As for whether it would prejudice, embarrass or delay the fair trial, the parties must not offend against the rules of pleading which have been laid down by law namely if a party introduces a pleading which is unnecessary and it tends to prejudice, embarrass and delay the trial of the action, then it becomes a pleading beyond his right. A pleading is embarrassing where it is not clear what is being pleaded.

[51] As to the meaning of 'an abuse of the process of the court' reference is made to the case of *Gabriel Peter & Partners (suing as a firm) v. Wee Chang Jin* [1998] 1 SLR 374 at p. 384:

> The term 'abuse of the process of the Court', in Order 18 rule 19(1) (d), has been given a wide interpretation by the Courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the Court must be used *bona fide* and properly and must not be abused. The Court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and

> oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose ... if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the Court.

[52] In the case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340, Gopal Sri Ram JCA had this to say in regard to the doctrine of abuse of process (see p. 352 of the report):

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

[53] In *Ebert v. Venvil And Another, Ebert v. Birch And Another* [1999] 3 WLR 670, CA, [2000] Chancery Division 484, CA, the Court there held that the High Court has an inherent jurisdiction to prevent the institution of civil proceedings which are likely to constitute an abuse of the process of the court.

[54] In dealing with the defendant's application to strike out the plaintiff's claim, there are voluminous affidavits filed by the parties herein containing a multitude of issues and facts relating to the allegations of misrepresentation relating to the expertise possessed by the plaintiff in timber harvesting by using a helicopter aircraft, immoral and against public policy and a host of other issues. A perusal of the facts and issues transparent from the pleadings before the court clearly indicate that there are issues that has been brought up to light and seeking determination. This in the court's view cannot be a plain and obvious case. It has always been said that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19(1) RHC 1980. The summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it

'obviously unsustainable.' In this respect the court is not obliged to go on a minute examination of the documents and facts of the case. So long as the pleading disclosed some cause of action or has raised some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for it to be struck out. It is trite and settled principle of law in the *locus classicus* case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 where Mohamed Dzaiddin SCJ delivering the judgment of the Supreme Court stated at p. 11:

> Secondly, based on the competing affidavits of the parties, can this court exercise its power under the said order or under its inherent jurisdiction to strike out the same pleadings on the grounds that they are frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the court under r. 19(1)(b), (c) or(d) of Order 18?
>
> The principles upon which the court acts in exercising its power under any of the four limbs of Order 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Lt v. Wilkinson, Heywood & Clark Lt*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (see *AG of Duchy of Lancaster v. L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33 r. 3 (which is in *pari materia* with our Order 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[55] Having stated the legal principles in an application for striking out the plaintiff's claim, and in the same breath, the court is also mindful of the fact that it has allowed the defendant unconditional leave to defend in an application by the plaintiff for a summary judgment under O. 14 RHC 1980.

[56] It would be in the court's view, that to allow the defendant's application in encl. 8 would be inconsistent with the decision made in respect of the plaintiff's application in encl. 6 having ruled that there are triable issues raised by the defendant.

[57] In all fairness to the plaintiff, the court finds that the plaintiff's claim is not a plain and obvious case as envisaged in the case of *Bandar Builder Sdn Bhd (supra)*. The court hereby dismisses the defendant's application encl. 8 with costs in the cause.